

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



DATE ISSUED: September 29, 2000

CASE NO.: 2000-BLA-00418

In The Matter Of:

DONALD YEDLOSKY
Claimant

v.

BARNES & TUCKER COMPANY
Employer

and

DIRECTOR, OWCP
Party-in-Interest

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises under the Black Lung Benefits Act of 1977, as amended, at 30 U.S.C. § 901 *et seq.* (Act), and the implementing regulations thereunder at 20 C.F.R. Parts 718 and 725 as amended by the Black Lung Benefits Act of 1980. This claim is brought by Donald Yedlosky, Claimant, against his former employer, Barnes & Tucker, Employer, and Louisiana Workers' Compensation Corporation. A hearing was held in Waco, Texas on May 19, 2000 at which time the parties were represented by counsel and given the opportunity to offer testimony, present documentary evidence and to make oral argument. This decision is being rendered after having given full consideration to the relevant evidence and briefs. The following exhibits were received into evidence at the formal hearing:

- 1) Director's Exhibit Nos. 1-17;

2) Employer's Exhibit Nos. 1-7.¹

The record was held open until July 19, 1999 for additional post-hearing evidence to be received. During that period, three exhibits were received and marked as Employer's Exhibit 8, Employer's Exhibit 9, and Employer's Exhibit 9 (cont.).²

OVERVIEW OF THE BLACK LUNG PROGRAM

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Entitlement is not automatic, nor does it serve as a pension or retirement program for coal miners. Rather, those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease develops where particles of coal mine dust become lodged within the miner's lungs, opacities begin to form and worsen in number and size over time, even in the absence of continued exposure to coal mine dust, eventually leaving the miner totally disabled and contributing to his death.

ISSUES

Listed as contested issues on the CM-1025 are: (1) whether the miner worked at least 6 years in or around one or more coal mines; (2) whether the miner suffers from pneumoconiosis as defined by the Act and the regulations; (3) whether the pneumoconiosis arose out of coal mine employment; (4) whether the miner is totally disabled; (5) whether his total disability is caused by pneumoconiosis. DX-17.

JOINT STIPULATION OF MEDICAL EVIDENCE³

X-Ray Evidence⁴

¹ The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX - Claimant's Exhibit, EX - Employer's Exhibit, DX - Director's Exhibit and TR - Transcript of the Proceedings.

² Employer's Exhibit 8 consists of medical evidence received from Dr. Coleman. Employers Exhibit 9 consists of the first part of a deposition taken of Dr. Gregory Fino, MD on May 25, 1999. The second part of this deposition, which was taken on June 29, 2000 and consists of the cross-examination of Dr. Fino by Claimant's counsel, will be referenced as EX 9 (cont.).

³ The Court finds that there is sufficient evidence of record to support the stipulations of Claimant and Employer designated JX-1. The evidence is sequenced chronologically in this section.

⁴ "B" denotes "B" Reader; "C" denotes "C" Reader; and "R" denotes Board-Certified Radiologist.

- | | | | |
|----|--------------------|---|-------|
| 1. | Date: ⁵ | 9/9/99; 9/9/99 | EX-4 |
| | Physician: | Luterman | |
| | Result: | ½ lower zones | |
| 2. | Date: | 9/9/99; 11/5/99 | DX-15 |
| | Physician: | Palmer (B/R) | |
| | Result: | Negative for
pneumoconiosis | |
| 3. | Date: | 9/9/99; 11/10/99 | DX-15 |
| | Physician: | Wolfe (B/R) | |
| | Result: | Negative for
pneumoconiosis | |
| 4. | Date: | 9/9/99; 11/29/99 | DX-15 |
| | Physician: | Herbick (B/R) | |
| | Result: | Negative for
pneumoconiosis | |
| 5. | Date: | 9/9/99; 2/21/00 | EX-5 |
| | Physician: | Fino (B) | |
| | Result: | Negative for
pneumoconiosis | |
| 6. | Date: | 10/11/99; 11/19/99 | DX-11 |
| | Physician: | L. Preger (B/R) | |
| | Result: | Film quality established at 2.
Pleural thickening consistent
with pneumoconiosis
3mm metallic body right
lower chest; need to verify
pleural thickening or
extra fat; old granulomata | |
| 7. | Date: | 10/11/99; 11/19/99 | DX-11 |
| | Physician: | L. Preger (B/R) | |
| | Result: | Film Quality established at 3
due to darkness of x-ray. | |

⁵ The two dates given are date of x-ray and date of reading, respectively.

Unable to determine the presence or absence of opacities. Pleural thickening consistent with pneumoconiosis
3mm metallic body right lower chest; need to verify pleural thickening or extra fat; old granulomata.

Pulmonary Function Study Evidence

1. Date:	9-9-99	DX-7
Physician:	Luterman	
Qualifications:	Pulmonologist	
Age/Height:	47/69"	
FEV1:	3.65/3.52 ⁶ (93%, 90%)	
FVC:	5.47/5.20 (112%, 107%)	
FEV1/FVC:	67/68	
Tracings:	Yes	

Arterial Blood Gas Study Evidence⁷

1. Date:	9/9/99	EX-4
Physician:	Luterman	
Altitude:	less than 2,999 ft.	
pCO2/pO2(R):	38/62	
2. Date:	10/5/99	DX-10
Physician:	Coleman	
Technician:	Goodwin	
Altitude:	less than 2,999 ft.	
pCO2/pO2 (R):	39.4/71.6	
pCO2/pO2 (E):	83.7/38.3	

⁶ The two readings given are for before the bronchodilator and after the bronchodilator, respectively.

⁷ "R" denotes resting, and "E" denotes after exercise

3. Date: 10/5/99 (Exercise Study) DX-7
Physician: Coleman/Providence
Health Center
pCO₂/pO₂ (R): 39/72 (6.4%)
pCO₂/pO₂ (E): 38/84 (5.7%)

MEDICAL REPORTS AND DEPOSITIONS

Medical Reports

David L. Luterman, M.D.

Employer submitted a medical report and test results given by Dr. David Luterman, a certified pulmonologist. This report was based on an examination of the Claimant conducted on September 9, 1999. In this report, Dr. Luterman states that he was asked to examine the patient at the request of the Employer and evaluate the Claimant for Black Lung disease. This report contains a brief summary of Claimant's medical history, as reported by the Claimant, both present and past. Claimant reported his age as 47. He stated that he had been smoking since his teenage years, but had cut back on his smoking for the six months prior to the examination. He reported that he worked in the coal mines from 1971 to 1975 as a roof bolter. He disclosed past employment including work as a window maker and other work involving glass. He reported that to the best of his knowledge he had not been exposed to asbestos or silicates. His past medical history included hospitalization in 1996 at Providence Hospital in Waco, Texas for three months. Claimant reported a fever of 106, liver disease, and kidney failure. Claimant reported that he was told that he had a fungus on a heart valve. He had no surgery of additional treatment. He reported wrist surgery in 1986 and reports a history of heavy drinking. He currently suffers from arthritis. The report contains Claimant's present medications of Prilosec for his stomach, 100mg of Zoloft daily, a nerve pill three times daily, and Hydrocodone 2 to 6 tablets a day for back pain. Claimant reported shortness of breath when he exerts himself and when he carries heavy objects. He also reported blurry vision, a tightness in his chest, and ulcers, as well as chronic back pain. EX-4.

The bulk of Dr. Luterman's report consists of an examination of the Claimant with three types of examinations performed – a chest x-ray, pulmonary function test, and arterial gas studies. These results are reproduced in the joint exhibit. EX-4, JX-1.

After examining the Claimant and conducting these tests, Dr. Luterman's impression was that Claimant suffered from coal workers pneumoconiosis and obstructive airways disease. He stated that he arrived at this impression, in part, because Claimant worked in the coal mines and had a radiographic picture of pneumoconiosis. He also reported that the Claimant has altered pulmonary function with mild obstructive airways disease, mild reduction in diffusion, and a significant reduction in his arterial oxygen tension. Dr. Luterman further noted his recommendation that the Claimant quit smoking in order to protect his remaining lung tissue and to slow any progressive deterioration.

EX-4.

Robert R. Springer, M.D., F.C.C.P.

Dr. Springer, a certified pulmonologist, examined the Claimant on October 11, 1999 in order to render a second opinion for the Black Lung disease claim. This report included a history of present and past illnesses as reported by the Claimant. In this report, Claimant stated that he worked for Barnes and Tucker Mining from 1972-1977 as a miner's helper with no respiratory equipment for protection. His subsequent employment was working with glass fitting and repair with no known toxic exposure. He reported several medical problems occurring in 1995, including acute renal failure, alcoholism, liver problems, congestive heart failure and lung disease. Claimant reported that his medical problems left him totally disabled from any future work. He also reported that he cannot walk more than half a block or half a flight of stairs without severe shortness of breath. Dr. Springer concluded that some of this is related to intermittent claudication and lower back problems and some is due to shortness of breath. Claimant reported a cough productive of grey to occasionally blood streaked sputum and chest pains. He also reported no current medications and no known drug allergies. DX-8.

Dr. Springer's report includes a second review of the data taken in Dallas by Dr. Luterman. An x-ray was taken during Dr. Springer's examination but not included in this report. Dr. Springer determined that the pulmonary function study indicated that total lung capacity was 132% of predicted and a diffusion capacity corrected for alveolar ventilation, at 60% of predicted. He stated that this indicated evidence of emphysema with marked diffusion problems. The arterial gas studies revealed figures that Dr. Springer reported as indicative of ventilation perfusion mismatch and diffusion problems that were related to this patient's lung disease. Dr. Springer's impression was that the Claimant suffered from advanced emphysema, Black Lung disease (with an occupational exposure latency of 22 years), atherosclerotic cardiovascular disease (with peripheral vascular insufficiency), and degenerative joint disease of the lower back. DX-8. Dr. Springer concluded his report by attributing 50% of the Claimant's current lung problems to coal miner's exposure and 50% to a combination of nicotine abuse and heart disease. DX-8.

William Coleman, M.D.

Dr. William Coleman, M.D., at the Providence Health Center, examined the Claimant on several occasions as a treating physician. On October 5, 1999, the lab technician at the Providence Health Center performed an arterial blood gas study on Claimant to be included in Dr. Coleman's Patient Report. DX-8. The results of this study showed that at rest the claimant's values were below the reference range both during rest and after exercise. DX-8. The record also contains several reports that Dr. Coleman referred Claimant to undergo pulmonary rehabilitation tests. Claimant's evidence also contains records indicating that Dr. Coleman examined Claimant on several other occasions for chest pains, lower back pain, and flu-like symptoms. EX-8.

George W. Strother, M.D.

Dr. George Strother, pulmonologist, submitted a report after viewing the objective medical evidence given to him by the Employer. He viewed 14 items of medical evidence and the three chest x-ray films taken on September 9, 1999. Dr. Strother concluded that there was sufficient objective evidence to evaluate the presence or absence of occupational lung disease, pulmonary impairment, and pulmonary reserve to perform the physical requirements of the last classified job in the mines. EX-7. Dr. Strother concluded that the Claimant did not have coal worker's pneumoconiosis, because the chest x-rays had no linear or rounded densities associated with the disease. He classified the September 9, 1999 chest x-ray as 0/0 for dust pneumoconiosis. EX-7.

After reviewing Claimant's employment history contained in Dr. Luterman's and Dr. Springer's reports, Dr. Strother evaluated the pulmonary function studies performed on September 9, 1999. He concluded that this test suggested less than optimal brisk onset of forced exhalation but the remainder of forced exhalation appeared suitable. He reported that the single breath diffusion was reduced, but concluded that the reduction might have been caused by recent active smoking. He concluded that the pO₂ was reduced for the patient's age, and was only minimally reduced in the tests taken on October 5, 1999. This pO₂ level, however, increased to normal range with exercise. He also noted a decline in the FEV₁/FVC ratio. Dr. Strother concluded that the Claimant's lung function tests results and arterial blood gas results were characteristic of many years of heavy cigarette smoking. Additionally, he concludes that the five possible years of coal dust exposure was so minimal that little to no adverse effects would occur, and the coal dust exposure of five years would not cause the lung function test results found in this Claimant. EX-7.

Dr. Strother concluded that, to a reasonable degree of medical certainty, the minimal decline in the FEV₁/FVC ratio would not cause pulmonary impairment which would preclude him from performing work of a moderate to high level, assuming Claimant was otherwise fit. He states that the claimant's airway injury is due to years of cigarette smoking and smoking during the time of his evaluation in 1999. EX-7.

Gregory J. Fino, M.D.

Dr. Gregory Fino, pulmonologist, testified by both deposition and medical report. Therefore, the substantive part of his testimony will be given in the deposition section of this opinion. He did not physically examine Claimant, but reviewed the objective medical evidence for evidence of Black Lung disease. This objective evidence consisted of x-rays, pulmonary function studies and arterial blood gas studies dating from 1996 to 1999. Dr. Fino determined that there was insufficient objective medical evidence to justify a diagnosis of coal worker's pneumoconiosis. Dr. Fino also concluded that the majority of the x-ray readings, taken from 1996 to 1999 were negative for pneumoconiosis. He reported that there was no occupationally acquired pulmonary condition. The pulmonary function study indicated only a very mild respiratory impairment. Dr. Fino concluded that even if the Claimant had either legal or medical pneumoconiosis, it neither partially nor totally disabled the Claimant. Dr. Fino's ultimate conclusion was that Claimant would be as impaired had he never worked in the coal mines. EX-5.

Medical Depositions

Gregory J. Fino, M.D.

Dr. Gregory Fino, certified pulmonologist and “B” reader, testified by both deposition and report. He stated at deposition that he had performed Department of Labor, Federal Black Lung Examinations.⁸ Dr. Fino testified that, although he did not examine Claimant, he was not at a disadvantage in determining the presence of pneumoconiosis as the medical literature is quite specific on the diagnosis of a coal mine dust-related pulmonary condition and whether or not an impairment or disability is present. He stated that the aforementioned determinations can be made only on objective data and, thus, the hands-on physical examination of Claimant would not be of benefit. He added that he had the additional benefit of being able to review x-ray readings and other laboratory data, including one blood gas from July 1996 and another from 1999. Dr. Fino testified that he did not believe that the opinion of the treating physician should be given extra weight. He stated that the symptoms related by a miner are not indicative of the genesis of their problems and are, therefore, irrelevant. He added that a diagnosis of chronic bronchitis does not connote that said bronchitis is due to coal dust exposure. Dr. Fino testified that the cough and mucus production resulting from coal mine dust inhalation in some miners dissipates within six to twelve months after leaving the mines. He stated that there is another reason to account for Claimant’s cough and mucus production, his smoking. EX- 9 pp. 11-14; EX-9 (cont.) pp. 21-26.

Dr. Fino testified that there could be an additive effect from smoking and coal dust exposure in some individuals. He stated that he did not believe that it is applicable in the instant case because of the time line of Claimant’s exposure and the fact that the objective data does not point to causation based on coal mine exposure. Dr. Fino testified that this data contains no indication that the exposure had an additive effect. EX-8 (cont.) pp. 26, 27. He stated that he does not believe Claimant suffers from pneumoconiosis. He testified that Claimant does have an exposure history that could cause a problem in a susceptible individual and that Claimant had the additional risk factor, for a lung problem, of smoking a pack a day. EX-9 pp. 14-16.

Dr. Fino testified that a chest x-ray, though it should not be totally relied on, is an important factor to assess. He stated that he did not discern any changes on Claimant’s September 9, 1999 x-ray. He added that none of the “B” reading revealed evidence of pneumoconiosis. Dr. Fino testified that one lung function study, performed on September 9, 1999 manifested a normal FVC and FEV-1 with a slight reduction in the ration of the FEV-1 to FVC. He stated that these results were consistent with a qualitative obstructive abnormality but not consistent with impairment. He testified that such abnormality is consistent with smoking, since it shows more reduction in small airway flow as measured by the FEF at 54% of normal. He added that the measure of large airway flow, FEV-1 was 93% of normal. Dr. Fino testified

⁸The Court notes that Employer did not number and paginate Dr. Fino’s deposition. The Court will identify the bifurcated deposition as EX-9 and EX-9 (cont.).

that Claimant's functional levels do not equate with industrial bronchitis or airway obstruction that has been described in some miners. He stated that Claimant's lung volume study, revealing overinflation, is typical of smoking, not disabling coal mine dust-related condition. He added that Claimant's reduction in diffusion capacity, as well as an elevated carboxyhemoglobin level, is consistent with his being a smoker at the time of the study. Dr. Fino testified that coal mine dust-related conditions can cause a reduction in diffusion, but Claimant's reduction is not of the "p" type, the type normally related to coal dust exposure. He acknowledged that a finding of a "p" type opacity is not necessary to a finding of pneumoconiosis. He added that you must also see abnormalities on an individual's x-ray before the individual suffers a diffusion reduction due to coal mine dust. Dr. Fino testified that Claimant's diffusion capacity is not of a severity level usually associated with pneumoconiosis. EX- 9 pp.16-19; EX-9 (cont.) pp. 12, 13.

Dr. Fino testified that the fact that Claimant's 1999 blood oxygen level was improved over his 1996 blood oxygen level was inapposite to a finding of pneumoconiosis. He testified that pneumoconiosis is a permanent condition which does not improve over time, and therefore the results are more consistent with smoking. He added that the fact that Claimant's pO₂ level increased on exercise is also contradictory to a finding of pneumoconiosis. EX-9 pp. 19-21.

Dr. Fino testified that Claimant position as a roof bolter was heavy labor involving heavy lifting and moving. He stated that from both a respiratory and a whole man perspective Claimant is capable of returning to his prior position. He added that the Black Lung Act is in place to find disability due to black lung disease. If there are non-pulmonary problems affecting the individual's lung condition that is not considered disability due to black lung. Dr. Fino testified that he does believe there are cases where there is a pre-existing weakness due to coal dust exposure, but does not believe that is a factor in the instant case. Dr. Fino testified that he disagrees with Dr. Springer's and Dr. Luterman's assessment that Claimant could not return to work because they believe Claimant suffers pneumoconiosis and he does not. Dr. Fino testified that Dr. Springer did not review Claimant's x-ray before rendering his diagnosis. He stated that Dr. Luterman noted a bilateral nodular pulmonary interstitial process involving the bottom half of Claimant's lungs, but did not describe the "p," "q," or "r" type opacity seen in pneumoconiosis. He added that pneumoconiosis usually initiates in the upper lung, not the lower. Dr. Fino testified that he agrees with Dr. Luterman that Claimant has an obstructive airway disease. He added that Dr. Springer opined that Claimant had advanced emphysema with 50% related to coal mine dust and 50% related to nicotine abuse and heart disease. Dr. Fino testified that he is not aware of heart disease causing lung problems. He stated that he did not believe Claimant suffered severe emphysema, as Dr. Springer opines, because his obstruction is too mild to indicate such a diagnosis. He added that even if Claimant's obstruction was due to black lung disease, it is not enough to prevent him from returning to his former employment. EX-9 pp. 22-26; EX-9 (cont.) 31.

Dr. Fino testified that he does not assess the qualitative exposure to coal dust when determining whether a Claimant can return to his former employment as such a factor is subjective and does not impact functional impairment or disability. He stated that when he assesses an individual's exposure, he assumes that the individual had the necessary exposure to cause disease if susceptible and takes into account the

record dates of their tenure which could enhance exposure. He added that Claimant's five or six years of exposure is on the "low side." He stated that his opinion does not account for the type of work done and the possibility of increased exposure, but is based strictly on the number of years exposed. EX-9 (cont.) pp. 15-20. Dr. Fino testified that the only medication of record prescribed for Claimant that related to pulmonary disease was Albuterol. He stated that records also note a history of black lung disease, but contains no mention of other lung diseases. EX- 9 p.9.

Dr. Fino testified that 95% of his expert testimony is on behalf of responsible operators. He stated that he finds evidence of pneumoconiosis in approximately 15-18% of the cases he reviews and in 20-25% of those cases he finds the Claimant disabled at least in part due to pneumoconiosis. He added that he charges \$300 per hour to review records. RX- 8(cont.) pp. 36, 37-39.

TESTIMONY AT THE HEARING

Donald Patrick Yedlosky

Donald Yedlosky, Claimant, testified that Barbara Ruckman is his common-law spouse. He stated that they have lived together as man and wife for nineteen years, and she introduces him as her husband. He stated that she uses either Ruckman or Yedlosky as her surname. He stated that Ms. Ruckman was divorced from her first husband in 1978. He added that he has never been married. Claimant testified that he is covered under Ms. Ruckman's health insurance. TR. 15-19.

Claimant testified that he began work as a coal miner in 1972 at the age of 20. He stated that his first coal mine employment position, as a Lee Norris miner helper, was with Employer. He added that his duties included watching the cables on the miners, setting timbers and canvas, shoveling coal from the side of the rib, and loading and unloading supplies from the conveyor belt. Claimant testified that he worked around coal-cutting equipment such as hard heads, a Lee Norris, a long wall, and a mole. He stated that he did not have respiratory equipment outside of an emergency can respirator. He added that he held the position for two and one-half years. Claimant testified that the coal sink was approximately forty-eight inches. He stated that he worked overtime two or three times a month for two-three hours. TR. 22-25.

Claimant testified that his second job with Employer was as a roof bolter in the same area of the mine. As a full time roof bolter, he stated that he took out the coal, timbered the roof, and positioned the pins in place. He added that he dusted rocks, set up canvas, timber, and whatever else he was instructed to do. Claimant testified that he worked approximately forty feet from the coal cutting equipment while functioning as a roof cutter. He stated that roof bolting involves drilling the points where the bolts are to be inserted. He added that, at that time, he worked as a roof-bolter as needed and filled the remaining time with whatever he was instructed to do. Claimant testified that all of his work was performed underground. TR. 25-28. Claimant testified that when he worked in 24D, his clothes were black with coal dust after his shift. He stated that there were on-site shower facilities for showering before leaving. He stated that he brought his clothes home for cleaning every two days. Claimant testified that when he first began work in

the mines, he did not notice a change in his breathing, but would cough up black mucus every day. TR. 29,30.

Claimant testified that when he left 24D he moved to 24B, located directly underneath. His position in 24B was that of a miner's helper. He stated that in 24B they utilized moles, not Lee Norrises. He added that the moles had water operations to keep the dust down, but they functioned only about three-quarters of the time. Claimant testified that in 24B, as in 24D, there were no filters or respirators other than the emergency can respirators. Claimant testified that after functioning as a miner's helper for a year and a half, he attained the position of roof bolter with the same duties as he had as a roof bolter in 24D, but utilizing different machines. He stated that Employer's was the last coal mine position he held. TR. 31-33.

Claimant testified that the duties of a roof bolter mandated spending his entire shift on his knees. He stated that he also had to carry eighty pound bags of rock dust, bolts weighing forty pounds and pins weighing fifteen to twenty pounds. He added that he had walk talk back to the face of the mine when leaving, a distance of anywhere from twenty-five feet to a couple of thousand feet. Claimant testified that one was always bent or stooped over in the mine. Claimant testified that he did not disagree with his Social Security records, which indicate that he last worked in the mines for Employer from the last quarter of 1972 through the end of 1975. TR. 34-36.

Claimant testified that he cannot sleep through the night, because he has to rise four to six times each night due to his breathing and back problems. He stated that he cannot sleep flat and usually sleeps in a recliner or propped on pillows. He added that he wheezes nightly and his chest "feels heavy." Claimant testified that he coughs throughout the day and the night with phlegm production, with the phlegm production worse in the morning. He stated the phlegm is brown and yellow and sometimes laced with blood. Claimant testified that it is harder for him to breathe when it is hot. He stated that he is on an inhalant medication for his breathing, Proventil, but does not use oxygen. TR. 37-40.

Claimant testified that he has recently had disk surgery, performed by Dr. Gordon, neurosurgeon, and takes hydrocone for pain. He stated that he takes Zoloft for "nerves" and Prilosec for his stomach. He added that he cannot take anything for his arthritis due to liver problems, but takes an aspirin a day. Claimant testified that his primary physician for the last two years is Dr. William Coleman, a family practitioner or internist. He stated that prior to Dr. Coleman, Dr. Pryor was his primary care physician. Claimant testified that he was examined by Dr. Schultz, a heart specialist, to determine whether or not his heart could withstand the back surgery. He stated that in 1996 he was hospitalized for acute alcoholism, fever and hepatitis. He stated that he was placed temporarily on dialysis for kidney failure, but is not currently on dialysis. He added that he occasionally takes Flomax for his kidneys. Claimant testified that he stopped drinking in 1996. Claimant testified that he began smoking at the age of 15 or 16, but did not smoke heavily until he completed school and began working. He stated that during his tenure in the coal mines, he smoked less than a pack a day. He added that after he left the mines, his smoking increased to two to two and one-half packs a day. Claimant testified that currently he smokes approximately a pack a day.

TR. 40-52.

Claimant testified that from 1969 through 1971, he worked for United Way of Greater Johnstown in Pennsylvania clearing roadsides and creek beds. He stated that from 1971-1972, he worked in the laundry at Miner's Hospital of Northern Cambria in Spangler, Pennsylvania. Subsequent to his employment with Employer, Claimant worked primarily with glass companies glazing and caulking windows or "seaming" glass. Claimant denies exposure to glass dust or asbestos during the aforementioned employment. Claimant denied exposure to pesticides or hazardous chemicals. Claimant testified that he has been on Social Security Disability since 1996. TR. 53-62.

STANDARDS OF ENTITLEMENT

Because this claim was filed in July of 1999, it is governed by the regulations at 20 C.F.R. Part 718.⁹ Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) that he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) that he is totally disabled; and (4) his total disability is caused by pneumoconiosis. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986)(en banc); Baumgartner v. Director, OWCP, 9 B.L.R. 1-65 (1986)(en banc). Evidence which is in equipoise is insufficient to sustain Claimant's burden in this regard. Director, OWCP v. Greenwich Collieries, et al., 114 S. Ct. 2251 (1994), aff'g sub. nom. Greenwich Collieries v. Director, OWCP, 990 F.2d 730 (3d Cir. 1993). Failure to establish any one these elements precludes entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Background

The Claimant was born on August 4, 1952. DX-1. He has an education level of grade twelve. DX-1. He has lived with Barbara Ruckman, in a common law marriage, for nineteen years. TR. 15. This Court finds that the Claimant has one dependent for purposes of augmentation of benefits under the Act. TR. 21.

2. Length of Coal Mine Employment/Responsible Owner

The parties have not stipulated to the length of the miner's employment. The regulations at § 718.301(a) provide that "[r]egular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a

⁹ As the miner last engaged in coal mine employment in the State of Pennsylvania, appellate jurisdiction of this matter lies with the Third Circuit Court of Appeals. Shupe v. Director, OWCP, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

specific number of days of employment within a given period.” The Act and implementing regulations do not provide specific guidelines for computing the length of coal mine employment. However, the Board has upheld the calculation of years of coal mine work that is based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. Clayton v. Pyro Mining Co., 7 B.L.R. 1-551 (1984). The Claimant bears the burden of production and persuasion in establishing the length of coal mine employment. Schmidt v. Amax Coal Co., 7 B.L.R. 1-489 (1984).

Probative sources of evidence regarding length of coal mine employment include social security earnings records, lay testimony of the miner or co-workers, affidavits, coal mine employment forms completed by the miner as part of his application for benefits, and birth certificates of the miner’s children. Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984) (counting quarters on the miner’s social security records wherein he earned in excess of \$50.00 per quarter was reasonable); Bizarri v. Consolidation Coal Co., 7 B.L.R. 1-343 (1984) (claimant’s credible testimony supported a finding of length of coal mine employment); Clayton v. Pyro Mining Co., 7 B.L.R. 1-551 (1984) (affidavits are relevant in determining length of coal mine employment).

A claimant’s employment history documents do not have to be corroborated to be found credible and, standing alone, may be the basis for a finding of length of coal mine employment. Harkey v. Alabama By-Products Corp., 7 B.L.R. 1-26 (1984). The claimant’s own testimony can be used exclusively in determining length of employment history where it is uncontradicted and credible. Bizarri v. Consolidation Coal Co., 7 B.L.R. 1-343 (1984). Similarly, where the Social Security earnings record is found to be incomplete, it is reasonable to credit the claimant’s uncontradicted testimony in establishing length of coal mine employment. However, Social Security records may be credited over the claimant’s testimony where the testimony is unreliable. Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984).

Upon review of the record in this case, it is initially noted that the district director found 3.25 years of coal mine employment based upon the Claimant’s social security earnings while employed by Barnes and Tucker, Inc. DX-11. These earnings report employment from the last quarter of 1972 through the last quarter of 1975. The Claimant’s initial application for benefits, filled out by the Claimant, however, states that he was employed from 1972 to November 8, 1977. DX-1. In the Claimant’s employment history form, he also reported that he began work in June of 1972 and ended work in September of 1977. These forms indicate a five to six year employment period. Additionally, the Claimant gave a consistent length of coal mine employment of 5 to 6 years in his office visits for his Black Lung evaluation. EX-4, DX-8. However, the Claimant, in his testimony at the hearing, could not testify as to the last date or even year that he worked for Employer. Tr. 36. When specifically asked if the social security figures indicating 3.25 years with Barnes and Tucker would be right, he indicated, “Yes, in that area.” Tr. 36. It is the Claimant’s burden of proof to establish the length of his coal mine employment. There is no indication that the Social Security records were incomplete, and these records are uncontradicted by the Plaintiff’s own testimony. The Claimant’s reported employment history in both his claim for benefits and his office visits contradict the Social Security figures, however, the Claimant could only account for the Social Security employment figures in his sworn testimony at the hearing. Thus, this

Court finds, from an examination of the entire record and the hearing testimony, that the Claimant has sufficiently established 3.25 years of coal mine employment.

Initially the Employer contested its status as the responsible owner. At the formal hearing, however, the Employer withdrew the issue. TR. 6. Therefore, this Court finds that the Employer is properly named as the responsible owner.

3. Existence of Pneumoconiosis and its Etiology

Pneumoconiosis is defined by regulation as, "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201. The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).¹⁰

In this case, a review of the radiographic interpretation evidence reveals a conflict in opinion as to whether Claimant suffers from coal worker's pneumoconiosis. When there is a conflict among x-ray interpretations, it must be resolved by the administrative law judge as a trier of fact. Dees v. Peabody Coal Co., 5 B.L.R. 1-117 (1982). Numerous guidelines exist for evaluating these diverse interpretations. The regulation at 20 C.F.R. § 718.202(a)(1) requires that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."¹¹ In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without

¹⁰ There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

¹¹ There are five main categories of qualifications for physicians who interpret x-rays in black lung claims. First, a "C" denotes a "C-reader." This category of readers is small and comprises those highly qualified physicians who developed the ILO-U/C system of classifying x-ray studies. A "B" indicates a "B-reader" who is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Bd-cert." means "Board-certified radiologist" who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. An "A" denotes an "A-reader" who is a physician, but not necessarily a radiologist, who submitted six x-ray studies of his or her clients to ALOSH of which two studies are interpreted as positive for the existence of pneumoconiosis, two studies are negative, and two studies demonstrate complicated pneumoconiosis. Finally, "Bd-elig." indicates a "Board-eligible radiologist" who has successfully completed a formal accredited residency program in radiology or diagnostic roentgenology.

these specialized qualifications. Roberts v. Bethlehem Mines Corp., 8 B.L.R. 1-211 (1985); Allen v. Riley Hall Coal Co., 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a Board-certified radiologist. Herald v. Director, OWCP, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). The actual number of interpretations favorable and unfavorable may also be a factor. Wilt v. Wolverine Mining Co., 14 B.L.R. 1-70 (1990). The qualifications of the doctor who provided the most recent evaluation may also bear on the evidentiary weight of the study. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988).

There are two x-rays in this record, taken in the period between September, 1999 and October, 1999. Each x-ray has contrary interpretations.

There are five interpretations of the x-ray pictures taken on September 9, 1999. Dr. Luterman, a pulmonologist, interpreted the radiographic pictures as positive for pneumoconiosis. He found particles and damage in ½ of the lower zones. However four other physicians, all dually qualified “B” readers and board certified radiologists, interpreted the x-ray as negative for pneumoconiosis. Considering the four physicians’ superior qualifications, against the one positive interpretation by Dr. Luterman with lesser qualifications, the Court finds that this particular x-ray is negative for pneumoconiosis.

The second x-ray pictures in the record are the most recent. Both were taken on October 11, 1999. Dr. Springer, the examining physician on October 11, 1999, did not submit a report on his review of the x-ray. As such, the first interpretation in the record was done by Dr. Preger, a certified “B” reader and board-certified radiologist. He interpreted two pictures of the Claimant’s chest. The first one was rated in quality as a two, which this Court finds to be an acceptable quality for interpretation. Dr. Preger concluded that the x-ray was positive. He noted that the x-ray showed pleural thickening, consistent with pneumoconiosis as well as a 3mm metallic body in the right lower chest. Dr. Preger interpreted the second picture to be a quality three, because it was dark. However, his opinion was the same as in the first picture. As an initial matter, the Court will assign little probative value to the x-ray picture reported to be a quality 3, because it was marked as too dark for interpretation. Therefore, there is only one interpretation of the x-ray pictures taken on October 11, 1999. Thus, this Court finds that the x-ray is positive for pneumoconiosis.

This Court finds that the record contains one positive and one negative x-ray interpretation. Therefore the x-ray evidence is essentially in equipoise. On the positive side, the x-ray interpretation, which is the most recent, was interpreted by a dually qualified physician. However, the negative x-ray was also interpreted by numerous and equally qualified physicians. Both of these x-rays were taken approximately one month apart, so the lapse of time between them would have no probative value. Since the x-ray evidence is in equipoise, this Court finds that, without more, the Claimant has not established the existence of pneumoconiosis under §718.202(a)(1).

Another method by which Claimant can establish that he suffers from the disease is by well-reasoned, well-documented medical reports. A Claimant can establish pneumoconiosis by this method

even in the absence of a definitive x-ray picture. A “documented” opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient’s history. See Hoffman v. B&G Construction Co., 8 B.L.R. 1-65 (1985); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984).

A “reasoned” opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician’s conclusions. Fields, supra. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner’s pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. Wilburn v. Director, OWCP, 11 B.L.R. 1-135 (1988).

In this case, there are several conflicting medical reports. Under these circumstances then, it may be appropriate to give more probative weight to the most recent report. Clark v. Karst-Robbins Coal Company, 12 B.L.R. 1-149 (1989)(en banc). On the other hand, a medical report may be given little weight if it is vague or equivocal. Justice v. Island Creek Coal Company, 11 B.L.R. 1-91 (1988).

Dr. Luterman, a certified pulmonologist concluded from an actual examination of the Claimant, that Claimant suffered from coal workers pneumoconiosis and obstructive airways disease. He stated that he arrived at this impression in part because Claimant worked in the coal mines and had a radiographic picture of pneumoconiosis. He also reported that the Claimant has altered pulmonary function with mild obstructive airways disease, mild reduction in diffusion, and a significant reduction in his arterial oxygen tension. Arterial blood gas results also showed significant resting hypoxemia – a condition consistent with pneumoconiosis. While noting that the Claimant was a smoker, Dr. Luterman concluded that Claimant had an altered pulmonary function indicating mild obstructive airways disease and mild reduction in diffusion capacity. Spirometry also showed a mild obstructive defect. Dr. Luterman concluded that these indicated pneumoconiosis from the coal mines. Dr. Luterman did note that continued smoking could cause further damage, but concluded that the test results showed pneumoconiosis. This Court does note that it gave little weight to Dr. Luterman’s interpretation of the chest x-ray taken on September 9, 1999. However, Dr. Luterman also based his impressions on the results of detailed pulmonary function and arterial blood gas testing in which his superior qualifications as a pulmonologist give more probative value to his final impressions than his x-ray interpretations. Additionally, he actually examined the Claimant, giving him a better chance to observe the Claimant’s symptoms and participation level in the tests.

Dr. Springer, a certified pulmonologist, also concluded that the evidence is sufficient to establish pneumoconiosis. He examined the Claimant, reviewed the pulmonary function tests, and reviewed the arterial blood gas study taken on September 9, 1999. His assessment of the objective medical tests revealed evidence of emphysema with marked diffusion problems. Additionally, in his opinion, the arterial blood gas studies were indicative of a ventilation-perfusion mismatch and diffusion problems. He concluded

that these results were due to the Claimant's lung disease. Dr. Springer also considered Claimant's long-term smoking history in his assessment of causation. His final assessment attributed about 50% of his current lung problems to his coal mine exposure and 50% to nicotine abuse and heart disease. This Court finds that both Dr. Luterman's and Dr. Springer's opinions as to the existence of pneumoconiosis are well-reasoned, and supported by the objective medical evidence of record.

On the other hand, there are two contradictory opinions in the record. Dr. Strother, at the request of Employer, reviewed fourteen items of medical evidence and three chest x-ray films dated September 9, 1999. Dr. Strother suggested that the Claimant's reduced diffusions rate, documented on September 9, 1999, was due to active smoking during the testing period. The Claimant's smoking history was documented and factored into both Dr. Luterman's and Dr. Springer's evaluations. Although Dr. Strother attributed all of Claimant's test results to the Claimant's smoking history, he failed to rule out pneumoconiosis as a cause. The only attempt to do this in his report was to use the Claimant's short length of employment in the coal mines. Using a time period of four to five years of coal mine employment, Dr. Strother made only a simple statement that coal dust exposure of four to five years would not cause the lung function test results. Dr. Strother's support for this contention was a report on occupational dust exposure in the U.S., Britain and Germany. This report contained studies showing that usually the miners would have approximately 35 years of underground work to have an adverse affect. This type of quantitative analysis is subjective at best and does not factor in the type of work that Claimant performed while in the mines. Even in Dr. Strother's report, he cites that the results of these studies present "substantial uncertainties" and "potential biases" in their estimates. Therefore, with respect to Dr. Strother's qualifications, this Court finds that Dr. Strother's report is not well-reasoned or documented.

Dr. Fino, a certified pulmonologist, also reviewed objective medical evidence at the request of the Employer. He submitted a detailed report and testified by deposition. Dr. Fino reviewed the pulmonary function studies performed on September 9, 1999 and concluded that the results were due to cigarette smoking. He did, however, concede that the reduced pulmonary function can be indicative of pneumoconiosis. Dr. Fino did not examine the Claimant, but presented a well-reasoned and detailed analysis of the objective evidence provided to him.

Thus, this Court has been presented with three well-reasoned and documented medical opinions. Two of these opinions conclude that the Claimant does suffer from pneumoconiosis, while the third concludes that the Claimant does not suffer from the disease. All of the physicians are certified pulmonologists. In weighing these opinions, however, it is significant that Dr. Fino testifies 95% for the responsible operator as an expert. Additionally, he finds evidence of pneumoconiosis in only 15-18% of the cases that he reviews. Substantively, he relied heavily on the negative interpretations of chest x-rays for his conclusions, a factor which this Court acknowledges as probative but not determinative regarding the existence of pneumoconiosis. As a final factor, both Dr. Luterman and Dr. Springer were able to examine Claimant and view his actions and participation levels in the tests. Thus, this Court will give determinative weight to the opinions of Dr. Luterman and Dr. Springer on the issue of existence of pneumoconiosis. Weighing the medical opinions as a whole, this Court will rely on the conclusions of Dr.

Springer, as well as Dr. Luterman, whose opinions this Court has found to be well reasoned and documented by the medical evidence of record. Thus, this Court concludes that the Claimant has established, by a preponderance of the medical opinion evidence, that he does have coal worker's pneumoconiosis.

The Claimant also has to prove that his pneumoconiosis arose out of coal mine employment. §718.203(a). If a miner has been employed in one or more coal mines for ten or more years, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. §718.203(b). When a Claimant has been employed less than ten years, however, he has to establish that the pneumoconiosis arose out of that employment by competent evidence. §718.203(c); Baumgartner v. Director, OWCP, 9 B.L.R. 1-65 (1986); Gee v. Moore & Sons, 9 B.L.R. 1-4, 1-6 (1986)(en banc). Specifically the burden of proof is met under §718.203(c) when, "competent evidence establishes that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure." Shoup v. Director, OWCP, 11 B.L.R. 1-110, 1-112 (1987).

In the present case the Claimant has only established that he worked for 3.25 years in the coal mines. Therefore, he is not entitled to the presumption. However, this Court finds that competent evidence exists to establish the requisite causal relationship between the pneumoconiosis and Claimant's coal mine employment. Dr. Luterman specifically attributed Claimant's condition to coal worker's pneumoconiosis and obstructive airways disease. Dr. Springer also attributed 50% of Claimant's respiratory problems to smoking and 50% to coal worker's pneumoconiosis. The fifty percent figure constitutes a "significant factor" in causation. Dr. Fino and Dr. Strother focused on the Claimant's heavy smoking history in reaching their conclusions. Dr. Fino reviewed the pulmonary function studies performed on September 9, 1999 and concluded that the reduced pulmonary function and respiratory problems were due to cigarette smoking as opposed to coal dust exposure. However, he conceded in his deposition that reduced pulmonary function may be indicative of coal miner's pneumoconiosis. Dr. Strother reported that Claimant's pneumoconiosis would not be related to coal mine dust, but relied almost solely on the number of years that the Claimant had been employed in the coal mines. The Claimant, whom this Court finds credible, also testified that he when he did work in the coal mines, he was covered in coal dust and coughed up black mucus every day. TR. 29, 30.

In weighing all of this medical opinion evidence on causation, this Court, for the same reasons as stated previously, finds that the conclusions reached by both Dr. Luterman and Dr. Springer are entitled to determinative weight. Since both physicians determined that the Claimant's reduced pulmonary function and abnormal arterial blood gas study results were a partial result of coal dust inhalation and exposure, this Court finds that Claimant has established, by competent evidence that his coal mine employment significantly contributed to causing his pneumoconiosis.

4. Establishing Total Disability

Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). The regulations at § 718.204(c) provide the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure;¹² (4) reasoned medical opinions; and (5) lay testimony.¹³ This evidence, either by presumption or through testimony must establish that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(c)(4). The Claimant has the initial burden of proof for establishing both the exertion standard for his coal mine employment and that he is totally disabled.

The Claimant testified at the hearing about the exertional requirements of his last employment position with the Employer. At the hearing, Claimant was credible and testified that he last worked as a roof bolter. His initial position in 24B was that of a miner's helper. He stated that in 24B they utilized moles not Lee Norrises, an older type of cutting machine. He added that the moles had water operations to keep the dust down, but they functioned only about three-quarters of the time. Claimant testified that in 24B, as in 24D, there were not filters or respirators other than the can respirators used in emergencies such as a fire. Claimant testified that after functioning as a miner's helper for a year and a half in 24B, he attained the position of roof bolter with the same duties as he had as a roof bolter in 24D, but utilizing different machines. He stated that Employer's was the last coal mine position he held.. TR 31-33.

Claimant testified that the duties of a roof bolter mandated spending his entire shift on his knees. He stated that he also had to carry eighty pound bags of rock dust, bolts weighing forty pounds and pins weighing fifteen to twenty pounds. He added that he had walk talk back to the face of the mine when leaving, a distance of anywhere from twenty-five feet to a couple of thousand feet. Claimant testified that one was always bent or stooped over in the mine. After weighing all of the evidence pertaining to exertional level, this Court finds that the Claimant's last position with Employer consisted of heavy labor. This finding is supported by Employer's expert, Dr. Fino, who also classified the roof bolter position as one involving heavy labor.

Total disability may be first established through qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 and require, in relevant part, that each study be accompanied by three tracings, Estes v. Director, OWCP, 7 B.L.R. 1-414 (1984), and that the reported FEV1 and FVC or MVV values constitute the best efforts of three trials. The administrative law judge may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. Houchin v. Old Ben Coal Co., 6 B.L.R. 1-1141 (1984); Runco v.

¹² There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

¹³ The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. Tedesco v. Director, OWCP, 18 B.L.R. 1-103 (1994).

Director, OWCP, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 value must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height and either the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height or the FEV1/FVC ratio must be equal to or less than 55%.

The following pulmonary function study is in the record:

Date	Tracing	Physician	Age/Height	FEV1	FVC	FEV1/FVC Qualifies?
9-9-99	Yes	Luterman	47/69	3.65 3.92 (93%) 3.52 (90%)	5.47 4.86 (112%) 5.20 (107%)	67% Actual 83% Predicted
						No

The FEV1, MVV, and FVC values are not equal to nor fall below the regulatory standards for a miner of Claimant's similar gender, age, and height. The regulatory standards for a miner of Claimant's gender, age, and height for FEV1 and FVC respectively were 2.57 and 2.77. There was no significant change or improvement post-bronchodilator. Based upon the foregoing, the miner has not established total disability pursuant to § 718.204(c)(1) of the regulations.

Total disability may also be established by qualifying blood gas studies under § 718.204(c)(2). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

Date of Test	Physician	Altitude	PCO2 ¹⁴	PO2
Qualifies?				
9/9/99	Luterman	0-2999	R:38	R: 62
10/5/99	Goodwin- technician Coleman	0-2999	R:39.4 E: 38.3	R: 71.6 E: 83.7
10/5/99	Coleman	u/k	R: 39 E: 38	R: 72 E: 84

Section 718.204(c) provides that, *in the absence of contrary probative evidence*, evidence which meets the quality standards of the subsection shall establish a miner's total disability. Claimant's test results on September 9, 1999 are qualifying under the statute. Therefore, in absence of contrary probative evidence, the Claimant has established total disability. The tests administered subsequent to September

¹⁴ The "R" denotes resting while "E1", "E2", and "E3" denotes three trials while exercising.

9, 1999, however, yielded non-qualifying results. Although these results contradict to the studies on September 9, 1999, this Court finds that the does not outweigh the Claimant's presumption of total disability under §718.204(c)(2). First, the altitude is not given for the exercise study, the report only notes that Claimant performed the test on a treadmill at a slight incline. Therefore the qualification factor of those test results are unknown, and the probative value of the test is minimal. The other blood gas study done on October 5, 1999 is complete. However, there were no objective notations made regarding the Claimant's ability to participate and reliability. On the other hand, in the September 9, 1999 tests, the physician notes that the Claimant's participation level and cooperation was very good, which the Court will take into account. Given these factors, as well as the qualifying results on the first test given, this Court finds that, in the absence of other contrary probative evidence, the Claimant has established that he is totally disabled for purposes of the Act, pursuant to §718.204(c)(2).

The second method by which Claimant can establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(c)(4).

This Court previously gave determinative weight to Dr. Luterman's and Dr. Springer's medical opinions regarding the existence and etiology of pneumoconiosis. As to the issue of total impairment, Dr. Luterman did not opine at all about whether the Claimant was able to return to coal mine employment or comparable employment. Dr. Springer did go into some detail, stating in his report that the Claimant's current level of disability was that the Claimant could not walk more than half of a block or half of a flight of stairs without becoming severely short of breath. Dr. Springer attributed part of this level of disability to Claimant's reduced pulmonary function. The Claimant's evidence of total disability also consists of the qualifying figures in the September 9, 1999 arterial blood gas study.

The employer's contrary evidence consisted of Dr. Fino's testimony. He testified through his report and his deposition that the Claimant was not totally disabled by the pneumoconiosis. Dr. Fino concluded that the last job Claimant held in the mines was that of a roof bolter. He classified the job as heavy labor, which is supported by the Claimant's own lay testimony. Dr. Fino, however, concluded that even if the Claimant was suffering from an obstructive impairment caused by pneumoconiosis, the impairment was not enough to prevent him from returning to his last job. In his support of this theory, Dr. Fino uses the change in pO₂ values from the arterial blood gas studies. Dr. Fino concluded that the fact that Claimant's pO₂ in the October tests was at a normal level during exercise, indicates that any impairment present was very mild.

Dr. Fino discussed both arterial blood gas studies and the change in results, but he failed to discount the fact that the figures present in the September 9, 1999 actually qualified the Claimant for total disability. Although Dr. Fino's report and testimony is contrary to the Claimant's presumption of total impairment, this Court must weigh it against the qualifying medical evidence. The qualifying arterial blood gas study

entitles the Claimant to a presumption of total impairment pursuant to the act. Dr. Springer's testimony regarding Claimant's current level of disability further supports the study's results. Claimant's testimony is consistent with his reports to both Dr. Luterman and Dr. Springer, and indicated that he could not walk more than a short distance without having breathing problems.

Therefore this Court finds that the Claimant has proven his total disability to return to his final position in the mines or comparative employment involving heavy labor. An examination of Dr. Springer's report and the Claimant's own testimony support the qualifying figures in the arterial blood gas study on September 9, 1999. The qualifying arterial blood gas result, bolstered by Dr. Springer's report, is not outweighed by Dr. Fino's contrary opinion regarding Claimant's level of disability. Thus, after an examination of the record and all probative medical evidence, this Court finds that the Claimant has established total disability pursuant to the presumption contained in §718.204(c)(1).

5. Etiology of Total Disability

A miner with less than fifteen years of coal mine employment must establish that his or her total disability is due, at least in part, to pneumoconiosis. The Board has held that "it is the claimant's burden pursuant to §718.204 to establish total disability due to pneumoconiosis...by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986). However, the Third Circuit requires that pneumoconiosis be a "substantial contributor" to the miner's total disability. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726 (3d Cir. 1989).

In the present case the Claimant has only established that he worked for 3.25 years in the coal mines. Therefore, he is not entitled to the presumption and must prove a causal relationship between his total disability and pneumoconiosis. However, this Court finds that the Claimant has established that pneumoconiosis was a substantial contributor to the miner's total disability. Claimant has proven this causal link by a preponderance of the evidence.

In weighing the medical opinion evidence on this issue, this Court, for the same reasons as stated previously, finds that the conclusions reached by both Dr. Luterman and Dr. Springer are entitled to determinative weight. Dr. Luterman specifically attributed Claimant's condition to coal worker's pneumoconiosis and obstructive airways disease. Dr. Luterman did not assign a specific percentage of the Claimant's impairment due to pneumoconiosis, however, his impression was that Claimant suffered from both obstructive airways disease and pneumoconiosis. Dr. Springer attributed 50% of Claimant's respiratory disability to smoking and 50% to coal worker's pneumoconiosis. Fifty percent constitutes a substantial amount of Claimant's disability. Both physicians determined that the respiratory problems resulting from pneumoconiosis contributed to the Claimant's disability within a reasonable medical probability. Dr. Fino does not believe that Claimant suffers from pneumoconiosis at all, and stated that Claimant's respiratory impairment and reduced pulmonary functions were due solely to a heavy smoking history. However, this Court, as stated before, accords determinative weight to the opinions of Dr. Luterman and Dr. Springer. Thus, this Court determines that Claimant has established that pneumoconiosis was a substantial contributor to his total respiratory disability.

Onset of Benefits

Claimant is entitled to benefits commencing on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis or, if such a date cannot be determined from the record, the month in which the miner filed his claim which, in this case, is July of 1996. 20 C.F.R. § 725.503; Carney v. Director, OWCP, 11 B.L.R. 1-32 (1987); Owens v. Jewell Smokeless Coal Corp., 14 B.L.R. 1-47 (1990). Moreover, it is noteworthy that the date of the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some prior point in time. Tobrey v. Director, OWCP, 7 B.L.R. 1-407, 1-409 (1984); Hall v. Consolidation Coal Co., 6 B.L.R. 1-1306, 1-1310 (1984).

None of the medical evidence available in this case established the onset date. Dr. Springer's report shows pneumoconiosis with a latent exposure period of twenty-two years, but it is not clear on the date of total disability. The medical reports of Dr. Luterman and Dr. Springer establish total disability, so this Court finds that the onset date of total disability occurred prior to that time. The earliest of Dr. Coleman's records showing various illnesses from April 1997 to July 1999, the filing date, do not contain any pulmonary impairment evidence that would aid the Court in determining the date of total disability as any earlier than the date of filing. Additionally, the 1996 medical reports from the Providence Health Center, where Claimant was admitted for pneumonia show no evidence of the date of total disability.

Upon review of the entire record in this case, it is determined that the exact onset date cannot be determined from the medical evidence and, therefore, benefits are payable from July of 1999, the month in which the miner's claim was filed.

Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by, Donald P. Yedlosky, is granted and benefits are payable commencing as of July 19, 1999. These benefits shall be augmented by reason of his 1 dependent, his common law wife, described above.

IT IS FURTHER ORDERED that, on or before November 2, 2000, Claimant's counsel, Leslie Mansfield, shall file, with this Office and with opposing counsel, a petition for a representatives' fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366. Counsel for the Director and Employer shall file any objections with this Office and with Claimant's counsel within 10 days following service of this application. It is requested that the petition for services and costs clearly state counsel's hourly rate and supporting argument or documentation therefor, a clear itemization of the complexity and type of services rendered, and that the petition request payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions

for services rendered before the district director or appellate tribunals. Ilkewicz v. Director, OWCP, 4 B.L.R. 1-400 (1982).

Entered this 29th day of September, 2000, at Metairie, Louisiana.

JAMES W. KERR
Administrative Law Judge

JWK/sls

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.